Supreme Court of the United States

October Term, 1956

No. ~~1059~~ 165

In the Matter of the Application of

MAX LERNER,

Appellant,

For an Order Under Article 78 of the Civil Practice Act,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting the New York City Transit Authority,

Appellees.

On Appeal from the Court of Appeals of the State of New York.

MOTION TO DISMISS APPEAL

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The appellee, the New York City Transit Authority, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal on the grounds that (I) no substantial federal questions are presented and (II) that in part the federal questions sought to be raised were not timely or properly raised or expressly passed on by the courts below.

Statement of Case

The appellant was competitive civil service employee of the New York City Transit Authority, a public benefit corporation created under the laws of the State of New

York to operate the transit facilities owned by the City of New York (Public Authorities Law, § 1200, *et seq.*, McK. Cons. Laws, c. 43-A).

As shall be more fully demonstrated *infra*, this appellant was dismissed as a security risk pursuant to a state statute in a proceeding which met the standards of due process required by the Fourteenth Amendment to the United States Constitution. [Security Risk law, L. 1951, c. 233, as amended, McK. Unconsol. Laws, Title 3, c. 14 §§ 1101-1108.]

In the instant case, the appellant was called before the Commissioner of Investigation of the City of New York, who was acting for the appellant's employer, the New York City Transit Authority, as well as the City. Having been informed of the provisions of the state's Security Risk law, the appellant was asked whether he was then or had been a member of the Communist Party which organization, after due hearing, had been found by the state's Board of Regents to be dedicated to the advocacy of the violent overthrow of the government.

The appellant refused to answer the question as to current or past Communist Party membership on the ground that his answer would tend to incriminate him. He was given a number of opportunities to reconsider his answer as well as the opportunity to secure counsel. The appellant secured counsel, but persisted in his refusal to answer. Even after the appellant had been notified that, as a result of his refusal to answer, his employer had concluded he was a security risk, he was given an opportunity to come to his employer and attempt to reassure the Transit Authority that he was an employee to be trusted. This he did not do even though he knew his dismissal would follow.

Under the Security Risk law, the appellant had a right to go before the State Civil Service Commission and test in a hearing the soundness of the Transit Authority's

conclusion that he was a security risk. The appellant did not avail himself of this opportunity but instead directed a court challenge to the right of his employer to take any action against him under the Security Risk law for his refusal to answer when that refusal was based on his plea that an answer would tend to incriminate him.

The Court of Appeals of the State of New York held: (1) the New York City Transit Authority to be a "board, body or commission of the state or of any civil division thereof" within the meaning of the Security Risk law; (2) that the Transit Authority was properly designated a "security agency"; (3) that the Transit Authority was authorized by the Security Risk law to suspend and discharge the appellant from his position upon his refusal to answer whether he was, at the time he was questioned, a member of the Communist Party, although his refusal was allegedly based on his fear that an answer might tend to incriminate him; and (4) upheld the constitutionality of the New York State Security Risk law. In this Court the appellant is not challenging the first of these holdings.

I. No substantial federal questions are presented.

It is apparent from an examination of the points raised by the appellant in his Jurisdictional Statement that the gravemen of his appeal is the contention that his removal from his position pursuant to the Security Risk law deprived him of due process of law.

The provisions of the New York State Security Risk law, which include the requirement of notice and a hearing and the right to an administrative appeal, constitute a procedure which carefully protects the rights of public employees at all stages and are a complete answer to the appellant's contention that he was deprived of procedural due process under the Fourteenth Amendment to the United States Constitution.

The appellant deliberately rejected the procedural protection that the statute afforded to him. He had a statutory right to appeal from his employer's determination to the State Civil Service Commission where he would have received a full hearing. The Commission specifically had the power to "require amplification" of the reasons for the dismissal (Security Risk law, § 1106). Having elected to have recourse to the court before exhausting the procedural safeguards established by the Legislature of the State of New York for his protection, the appellant cannot now be heard to complain about an alleged lack of process when he did not avail himself of the procedure provided in the statute.

The appellant, in his brief urging this Court to accept jurisdiction of his appeal, repeatedly states that his dismissal was based on an improper inference of Communist Party membership drawn from his invocation of his constitutional privileges. The opinion of the Court of Appeals is clear that no such inference was drawn either by his employer in dismissing him or by the courts in sustaining the dismissal.

On the contrary, the Court of Appeals held that the appellant was, in fact, dismissed for refusing his employer vital and fundamental information. This Court has recognized that a municipal employer may inquire of its employees "as to matters that may prove relevant to their fitness and suitability for the public service." *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, 720 (1950). The appellant, as a public employee, was under an affirmative duty to answer such pertinent questions as might be necessary to assure his employer, the Transit Authority, of his trust and reliability.

The Court of Appeals concluded that a refusal to answer, based on the ground of self-incrimination, should not put the appellant in a better position than the appellant

in the *Garner* case, *supra*, who had relied on an unexplained refusal, since, as between employer and employee, the duty to answer was the same in each case.

Mr. Justice Conway in his opinion for the court distinguished the instant case from *Slochower* v. *Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944 (1956), pointing out that in the *Slochower* case this Court condemned the automatic dismissal of an employee who invoked the privilege against self-incrimination, without any opportunity for considering the circumstances surrounding the invocation in each case. In the instant case, the court noted: (1) That the question put to the appellant was whether he was then a member of the Communist Party; (2) The Transit Authority did not invoke any automatic dismissal but reached a conclusion stemming from the particular facts in the appellant's case with such conclusion subject to review; (3) This was a question put on behalf of the appellant's employer by an authorized agent seeking information vital to the security, in time of enemy attack on the City of New York, of the transportation system on which 6,000,000 people depend each day.

This case is obviously different from *Konigsberg* v. *State Bar of California*, 77 S. Ct. 722, in that in the case at bar both before the Commissioner of Investigation, and by virtue of the notification from the Transit Authority, the appellant was made to realize that a persistent refusal to answer questions with respect to his fitness for employment would inevitably result in the loss of his position; the appellant was an employee in a position which was important to the security of the people of the City of New York in the event of an enemy attack; the question as to Communist Party membership was based on the fact that after notice and hearing it had been listed as a subversive organization.

The argument of the appellant that his dismissal violates the federal constitutional provision guaranteeing equal

protection of the law is untenable in that he fails to cite any case where the Court of Appeals applied a different rule in a proceeding for the removal of a civil-service employee.

The appellant was removed from his position pursuant to a procedure established by a law enacted by the New York State Legislature. Despite the transparent attempt of the appellant to portray the City's Commissioner of Investigation as a federal agent (Jurisdictional Statement, p. 13), this was not in any sense a federal proceeding in which a plea of the Fifth Amendment would have been valid. Rather, the removal of the appellant was a purely local proceeding, and the opinion of the Court of Appeals upholding the propriety of such removal rests upon an adequate non-federal basis. For the foregoing reasons the appeal should be dismissed.

II. In part, the federal questions sought to be raised were not timely or properly raised or expressly passed on by the courts below.

The appellant urges in this Court for the first time that he was deprived of due process under the Fourteenth Amendment in that he claims he had no opportunity to challenge the designation of his position as a security position or the designation of the Transit Authority as a security agency or the designation of the Communist Party as a subversive organization. (See Jurisdictional Statement, p. 4, Questions 6 and 7.)

The appellant's entire "due process" argument as presented to the New York State courts (Brief to Court of Appeals, Point II, pp. 13-17) was confined to the claim that his dismissal was based on an alleged inference resulting solely from his invocation of constitutional privileges as a basis for his refusal to answer questions relating to present Communist Party membership.

Nowhere in his brief in the court below did appellant raise a constitutional objection either to the designation of his position as a security position or to the designation of the Authority as a security agency. As a matter of fact § 1103 of the Security Risk law provides that such determinations by the State Civil Service Commission shall be subject to review by the courts in accordance with the provisions of Article 78 of the Civil Practice Act.

The appellant likewise failed to raise any constitutional objection in the courts below to the manner of designating the Communist Party as a subversive organization.

The Jurisdictional Statement (p. 5) alleges that on March 24, 1954, the State Civil Service Commission designated the Communist Party as a subversive organization under the Security Risk law, adopting, without notice, hearing or evidence, the finding to that effect made by the New York State Board of Regents under the Feinberg Law (L. 1949, c. 360). Security Risk law, § 1108, specifically authorizes the State Civil Service Commission to adopt designations of organizations as subversive groups made by the State Board of Regents pursuant to § 3022 of the Education Law (McK. Con. Laws, c. 16), provided such designation was made after due notice to such organization and an opportunity afforded to it to answer. The right of the State Board of Regents to make such designations after notice and hearing was upheld by this Court in *Adler v. Board of Education of the City of New York*, 242 U. S. 485 (1952).

The petitioner, had he appealed to the State Civil Service Commission, could have challenged the application to him of the finding that the Communist Party is a subversive organization, and, had he been unsuccessful, he might have secured a court review within four months of such application pursuant to the provisions of Article 78 of the New York State Civil Practice Act.

It is well-settled that an appellant is not entitled to raise in this Court claimed violations of constitutionally guaranteed rights not presented to the State courts. *Dewey* v. *Des Moines*, 173 U. S. 193 (1899); *Wilson* v. *Cook*, 327 U. S. 474 (1946); *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430 (1940).

Wherefore, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the courts of the State of New York herein be affirmed.

Dated: Brooklyn, N. Y., July 1, 1957.

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